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IN THE

Supreme Court of the United States

No.....

EDITH HONIGMAN, individually and on behalf of all Class B Stockholders of the Green Giant Company,
Plaintiff,
vs.
GREEN GIANT COMPANY, a Minnesota corporation, J. J. BABB, E. C. BROWN, E. G. COSGROVE, R. C. COSGROVE, W. F. DIETRICH, L. E. FELTON, T. G. HARRISON, C. P. JAFFRAY, M. H. MORRIS, G. C. SCOTT, A. R. UPGREN, L. C. VOLLING, and C. S. VRTIS, Individually and as Directors of the Green Giant Company; MINNESOTA VALLEY CORPORATION, a Minnesota corporation; and FIRST NATIONAL BANK OF MINNEAPOLIS, a National Banking corporation,
Defendants

PETITION FOR CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Edith Honigman, by the undersigned, her counsel, respectfully prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and in support thereof avers:

I. Citation of Opinion Below.

The opinion of the Court of Appeals was filed on November 7, 1962 and will probably appear in 309 F. 2d 667 (not yet issued). The opinion and the judgment entered thereon are appended hereto as Appendix A. The opinion of the district judge is unreported but appears at pp. 24 to 42 of the printed record, 9 copies of which have been filed with the Clerk of this Court concurrently herewith.

II. Basis of Invoking the Jurisdiction.

The judgment to be reviewed was entered on November 7, 1962. The jurisdiction of this Court to review by certiorari the decisions and judgment of the courts of appeal is set forth in 28 U.S.C., section 1254(1).

III. Questions Presented for Review.

The questions herein for review are of broad public importance in the field of protection of stockholders of publicly held corporations from mistreatment by the controlling management. More specifically, the issues involve:

1. The protection of public stockholders from unconscionable diversion of corporate assets by the controlling management.

2. The legality of the sale of control of a publicly held company for the private benefit of the controlling management.

3. The right of the courts to pass upon the fairness of a recapitalization plan upon complaint of a minority stockholder.

4. The duty of the controlling management of an unlisted company to abide by the requirements of fair disclosure in soliciting proxies from public stockholders.

IV. Statutes and Regulations Involved.

The statutes herein involved are set forth in relevant part in Appendix B hereof, and consist of the following:

The Securities Act of 1933, 15 U.S.C., section 77B (3) and section 77q

The Exchange Act of 1934, section 78j

The Securities Exchange Commission Rule 10B, 17C. F.R. 240, 10B-5

Minnesota Statutes Annotated, section 301.15 and 301.16

V. Concise Statement of the Case.

The facts are basically undisputed. The issues are primarily issues of law.

This is a class action brought by the plaintiff, a minority shareholder of Green Giant Company, against the controlling management to set aside a Plan of Recapitalization of that Company, or in the alternative to require return to the corporation of the unlawful bonus or premium obtained by the dominant stockholders and officers thereby.

Prior to the Recapitalization Plan in question, the Company's capitalization consisted of 429,000 shares of Class B common stock and 44 shares of Class A common stock. These shares were equal on a share-for-share basis, in right to dividends and assets and in all other respects, except that only the Class A stock had voting rights. The

total net worth of the Company, as represented by its outstanding Class A and Class B stock, was approximately $23,000,000, or a book value of about $50 per share for each share of A and B stock (356).

The Class B stock was held by some 1250 widely scattered public stockholders (318, 319), with the exception of about 30% held by the management stockholders. The Class A stockholders designated the members of the board and the management by reason of their voting control. C. N. Cosgrove, and his son, defendant E. B. Cosgrove, held 60% (26 shares) of the Class A stock and a large block of Class B stock. Through their voting control the Cosgroves controlled the Board of Directors (52, 53, 254, 270), and gained the top management positions in the Company, including the positions of the presidency and chairman of the board (49).

In June, 1960 the management of the Company approved a plan of recapitalization which was then promulgated by them for vote by the stockholders. Under the Plan, a single class of common stock was to be issued, with the Class B stockholders retaining their previous holdings of 429,000 shares in the exchange, but the Class A stockholders were to receive 44,000 shares for the 44 shares which they previously held. The justification for this grossly disproportionate allocation of 1000 shares of new stock for each share of Class A stock was predicated on the giving up of exclusive voting rights by the Class A stock (225, 216). Thus the B stockholders, who owned 99.99% of the Company, were cut down to ownership of 91.7%. The A shareholders, however, exchanged their ownership of 1/100 of 1% of the Company for the ownership of 9.3% (313). The 44 shares of A stock thus exchanged a total book value of $2,200 for a book value of over $2,000,000. Each share of Class A stock thereby became

entitled to approximately $50,000 in book value in place of its previous share of $50 in book value.

The Plan was submitted to the public stockholders by notice mailed on June 17, 1960 announcing a special stockholders meeting to be held on July 15, 1960 (310). The notice was accompanied by a proxy request (311-314) which outlined the proposed recapitalization plan without disclosing the identities, personal interests or stock holdings of the officers and directors individually profiting therefrom, and as an added inducement announced the Board's intention to split the stock "in the event the Plan is acted upon favorably" (314).

The notice urged approval of the Plan, declaring that the existing capital structure "has now become outmoded and will work to the future disadvantage of the stockholders and of the Company" (311); that "Your management unqualifiedly recommends approval" (313); that "We sincerely urge that you sign and return the enclosed Proxy promptly" (314). This presentation elicited a 92.3% favorable response (110).

The propriety and validity of this recapitalization plan was brought before the court in this action by plaintiff as a Class B stockholder, on behalf of herself and all other holders of Class B stock. Plaintiff is the owner of 1570 shares of the Class B stock which she has held since 1956, and which had a market value at the time of trial in excess of $60,000 (43, 109).

When her protest to the Board was rejected, she promptly instituted the instant action on July 5, 1960. Upon the District Court's rejection of her application for an interlocutory restraining order, defendants proceeded with the meeting of July 15, 1960, and adopted the Plan (109).

At the trial, plaintiff adduced expert testimony of security analysts, demonstrating the basic unfairness of the Plan (138, 142, 144, 149, 150, 151, 168, 174, 278-281, 284, 285, 294, 295). Defendants testified in support of the Plan relying particularly on the ground that in giving up their exclusive voting rights, the Cosgroves were giving up the emoluments of control, with particular emphasis that they were surrendering the right to vote themselves large salaries for an extended period of time. As a monetary basis for support of the Plan they capitalized a projected $75,000 per year executive salary over a period of 20 to 25 years (216).

No one questioned, however, that in actual fact the Cosgroves would retain, even after the recapitalization, the actual control of the Company by reason of their large holdings of stock (142, 263). Under the Plan, existing Cosgrove holdings of B stock aggregating 82,500 shares became voting stock in addition to the 26,000 shares of bonus stock to be given for Cosgrove's 26 shares of A stock (127). By these holdings, the Cosgroves were in fact the only significantly large holders of Company stock and thereby retained effective control.

The trial court rejected plaintiff's claims of the unfairness and illegality of the Plan, and was upheld on appeal.

VI. The Basis for Federal Jurisdiction Initially.

Federal jurisdiction was properly invoked herein (48) by reason of diversity of citizenship and the requisite amount, under the provisions of Section 1331 and 1332 of Title 28, U.S.C.

VII. Reasons for Granting the Writ.

Petitioner respectfully submits that a writ of certiorari should issue in this case because:

1. The decision below is contrary to the decisions of this Court and of the Courts of Appeal of other circuits in formulating rules of law for the protection of public stockholders from diversion of corporate assets by the controlling management.

2. The Plan of Recapitalization is unconscionably unfair in diverting huge corporate assets from public stockholders to the controlling management without fair or adequate consideration.

3. The decision below is contrary to the principles established in decisions of this Court and the Courts of Appeal of other circuits which make invalid and unlawful, the sale of corporate control of a publicly held company for the private benefit of the controlling management.

4. The decision below is contrary to the decisions of this Court and the Courts of Appeal of other circuits in accepting the numerical vote of the majority as binding on a minority stockholder who questions the fairness of a recapitalization plan.

5. The decision below is contrary to the principles established in decisions of this Court and the Courts of Appeal of other circuits, which require the managements of unlisted companies to make full and fair disclosure in soliciting proxies from public stockholders substantially similar to the requirements applicable to corporations listed on the national securities exchanges.

6. The foregoing issues present fundamental and important questions of public interest as to the nature and responsibilities of the fiduciary relationship of controlling management towards stockholders of publicly held corporations.

ARGUMENT

I. Controlling management may not divert corporate assets from public stockholders without adequate consideration, in contravention of its fiduciary responsibilities.

In Minnesota, as generally, those in control of the corporation are fiduciaries, obligated to serve the corporation and its stockholders in preference to their own interest, *Diedrick v. Helm*, 217 Minn. 483, 14 N. W. 2d 917, 918:

> "The relationship of directors of the corporation is a fiduciary one imposing upon them the duty to exercise their powers as directors *solely for the benefit of the corporation and its stockholders. Implicit in such duty is that of not exercising their powers as directors to serve their own personal interests at the expense of the corporation and its stockholders.*" (Emphasis supplied.)

This applies as well to the dominant or controlling stockholder (here, Cosgrove by virtue of his ownership of 60% of the voting stock).

> *Pepper v. Litton*, 308 U.S. 295, 84 L. Ed. 281;
> *Southern Pacific v. Bogert*, 250 U.S. 483, 63 L. Ed. 1099;
> *Perlman v. Feldmann*, 219 F. 2d 173 (C. A. 2, 1955), cert. den., 349 U.S. 952, 99 L. Ed. 1277.

As stated in *Pepper, supra*, at p. 311:

> "He who is in such a fiduciary position cannot serve himself first and his *cestuis* second."

Nor can he

> "* * * use his power for his personal advantage and to the detriment of the stockholders and credi-

> tors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements." (*Pepper, supra,* at p. 311.)

Here the original separation of voting power from the stockholder equity was effected by the Cosgroves, assertedly as a protection against "raiding". Cosgrove himself testified that this was merely an interim measure at the time, which would require later extension of the vote to the Class B stock as well (54). In fact, the Recapitalization Plan was presented to the stockholders, *via* the proxy solicitation, as necessary because of the "outmoded" and detrimental nature of the existing stock structure which Cosgrove himself had thus created (311).

In effect, therefore, the A shareholders (34 of the 44 shares were held by 4 members of the Board, including Cosgrove's 26 shares) are requiring the B stockholders to surrender some $2,300,000 of corporate equity as the price for correction of the Cosgrove-created defect in the corporate structure, on the justification that it is their price for the surrender of the perquisites of control.

The outstanding Green Giant stock is thus to be increased by the issuance of an additional 44,000 shares with no consideration other than an ostensible relinquishment of control. This has been done without any pretense of compliance with the Minnesota anti-stock watering statute (Appendix B, p. 34), which prohibits stock issuance for non-monetary consideration except upon formally recorded board resolution evaluating "in monetary terms" a fair and adequate consideration to the corporation therefor.

No actual surrender of control was in fact involved, for the Cosgroves emerged with effective control through

their large stockholdings, and retained the same corporate offices and emoluments for the relinquishment of which they were ostensibly being compensated. The 82,500 shares of Cosgrove B stock together with the 26,000 additional shares accruing to Cosgrove in exchange for his 26 shares of A stock gave him effective voting control. Cosgrove's 23% of the stock, as against the remaining 1250 small stockholders, scattered about the nation and owning only fractional percentages of stock, remained for all practical purposes full voting control.

Moreover, in the realities of the marketplace, the Cosgrove position as controlling management served further to insure their continuing control. As entrenched management in control of the proxy machinery of the Company they were assured continued control and self-perpetuation. See Berle & Means, "*The Modern Corporation and Private Property*", pp. 86-88, 139. Thus they really gave up little, if anything. Under the Plan, the A stockholders have thus purloined over $2,000,000 of B stockholder equity without any actual surrender either of control or of the emoluments thereof (301, 304).

Clearly, the purported correction at this price of the "outmoded", "disadvantageous" corporate structure was hardly a subordination of the personal interests of the fiduciaries to those of the corporation. Quite to the contrary, the instant Plan diverted over $2,000,000 of corporate assets to the controlling management without any semblance of fair or adequate consideration.

II. Controlling management may not sell corporate control of a publicly held corporation for its own private benefit.

The Recapitalization Plan herein was admittedly conceived and formulated on the theory that Cosgrove, the

dominant officer and stockholder, should be paid for giving up control (237). The theory, as propounded by defendants themselves, was (225):

> "We were confronted here with a problem in which a man owned 59% plus, voting control. That control had value, we were certain. Our question was to determine how much the Class B stockholders could afford to give to get him to relinquish this control."

They expressed the view that they were entitled to a large bonus to relinquish control, since (340):

> "• • • the chief value of control is the right to elect a principal officer of the corporation and thereby to obtain the largest salary that could not be attacked in the courts plus other perquisites of the office • • •."

No consideration was, however, given by Cosgrove, his Board or the professional underwriter employed to formulate this Plan, to the fact that Cosgrove originated this defective stock structure or the fact that he had a fiduciary duty to act predominantly in the corporate interest rather than his personal one, or to any of the questionable implications of legality of this purported sale of control by the fiduciary to his *cestuis que trust* (128).

Whether as managing officer, or as dominant stockholder (and Cosgrove here was both (49, 50, 52, 54)), he had a fiduciary obligation to the corporation and its public stockholders.

Diedrick v. Helm, supra;
Pepper v. Litton, supra;
Southern Pacific Co. v. Bogert, 250 U.S. 483, 39 S. Ct. 533, 63 L. Ed. 1099.

Under the guise of a recapitalization plan, the fiduciary here was exacting a two million dollar bonus from his *cestuis* for ostensible surrender of control. In principle, this does not differ from a sale of the fiduciary office by a fiduciary or trustee, a practice long condemned by the courts.

Hill, Sale of Controlling Shares, 70 Harvard Law Review 986, 998-999;
Jennings, Trading in Corporate Control, 44 Cal. Law Review 1 pp. 14 and 15;
Gerdes v. Reynolds, 28 N.Y.S. 2d 622 (S. Ct. 1941);
Insuranshares v. Northern Fiscal Corp., 35 F. Supp 22 (E. D. Pa., 1940);
Porter v. Healy, 244 Pa. 427, 91 Atl. 428;
Forbes v. McDonald, 54 Cal. 98.

Such a sale is the more reprehensible when made, not to a third party, but to the *cestui;* for in a sale to an outsider the latter not only may bargain more equally, but the consideration is paid by the third person. No dilution of corporate or stockholder equity need then be involved. Here, however, the fiduciary announces that his continuing in control is not good for the *cestui* and then proceeds to raid the trust's assets in payment for an ostensible relinquishment of control. The value of corporate control should not be deemed a personal asset, to be appropriated by the fiduciary. More important yet, the fiduciary should not be permitted to exact a large tribute from the *cestui* for ostensibly resigning his fiduciary position as controlling management.

Divorced from the Recapitalization Plan, the intrinsic value of the 44 A shares as such was nominal, for they had

no greater equity or dividend rights than the B stock. The Company's president testified (84):

> "I think it is a fair statement that the ownership in itself of A stock, as far as the minority holders were concerned, did not have more than the nominal or small economic value.
>
> "Mr. Cosgrove did not, to my knowledge, derive any economic benefit, vis-a-vis the company, by his ownership of A stock, except from the general economic benefit of being able to elect a majority of the board of directors."

The value of the Green Giant corporate enterprise derives from the successful operation and management thereof. For this, its officers and employees were well paid by the corporation (303, 305), and therefore by all of the stockholders. If it be held nevertheless, that the value of control is the private asset of the dominant stockholder-officer, rather than the property of the corporation and all of its stockholders, the result is that the paid fiduciaries, rather than the *cestuis*, are enabled to siphon off the fruits of successful administration of the trust, and corporate fiduciaries are encouraged to assume conflict-of-interest positions wherein they may exact personal tribute for performance of their fiduciary reponsibilities.

As stated by Professor Berle, 58 Columbia Law Review, 1212 at p. 1220:

> "*Sale of Control: Property rights in the value of the power position.*
>
> "A third group of decisions dealing with the control function relate to benefits derived from its sale. These decisions point to a slowly emerging rule (by no means universally accepted) that where stockholdings carrying controls are sold, any identifiable

portion of the consideration paid for the power-position over and above the value of the stock *ex* the control-power element belongs not to the control-seller but to the corporation or (perhaps) to all the shareholders ratably."

A clear-cut clarification of this issue would represent a long step forward in resolving divergent views in the various circuits as to self-interest actions by fiduciaries of publicly held corporations. *It is important for the protection of public stockholders that this Court should clearly enunciate the principle that corporate control of a publicly held company cannot be traded in by controlling management at the expense of the stockholders whom they represent.*

III. The fairness of a plan of recapitalization may be questioned by a minority stockholder despite an overwhelming contrary majority vote.

Much stress was laid by the courts below upon the 92.3% favorable vote, elicited by the proxy solicitation. Realistically, of course, such a vote reflects the effectiveness of the presentation rather than either its fairness, or the validity of the Plan. Where pertinent facts have been withheld, or controlling stockholders or officers have violated their trust, the Plan may be invalidated at the instance of even a single stockholder.

Seagrave v. Mount, 212 F. 2d 389 (C. A. 6, 1954);
Perlman v. Feldmann, 219 F. 2d 173 (C. A. 2, 1955), cert. den., U.S. 952, 99 L. Ed. 1227;
Subin v. Goldsmith, 224 F. 2d 753 (C. A. 2, 1955) cert. den. 350 U.S. 883, 100 L. Ed. 779;
Shlensky v. South Parkside Building Corp., 19 Ill. 2d 269, 166 N. E. 2d 793.

It is a familiar fact of corporate life that scattered, uninformed public stockholders tend almost invariably to go along with management recommendations (281). Control of the corporate management and apparatus carries with it control of the favorable presentation to the public stockholders of any proposal supported by management. When the plan submitted is that of management's own choosing and formulation, accompanied only by their own one-sided presentation, sugar coated with a proffered but conditional stock split and implication of stock-exchange listing (54, 55, 311), the public stockholder acceptance thereof is inevitable.

In the realities of the market place, the Cosgrove management had the power to impose this plan upon the public stockholders, and did. As courts and writers have frequently noted, the stockholders of publicly held corporations are generally not equipped to pierce through the skein of skillfully drawn proxy solicitations. Moreover, those who are, rarely have the time, money or inclination to take on a court battle such as this, or enough stock to make it worth their while. As this Court can readily recognize from the time and effort expended here and below, in addition to stenographic, printing, travel and other expenses involved, the cost of such a fight is generally prohibitive to the small public stockholder.

Here before this Court for review is the saga of an expropriation of over $2,000,000 in corporate assets ostensibly in exchange for a technical extension of voting rights to scattered small public stockholders in whose hands such right was in fact meaningless. It is apparent that the public stockholders were either not aware of their victimization or incapable of taking the necessary measures for their own protection. This Court has the opportunity to forestall such victimization of public stockholders by its decision in the instant case.

IV. Disclosure requirements in proxy solicitations for unlisted companies should be substantially similar to the requirements applicable to listed companies.

The stocks of listed or registered companies represent but a limited portion of the corporate stocks which are daily bought and sold across the nation. Much, if not most, of the traffic is in unlisted stocks. Accordingly, in the framing of national securities legislation and policy, Congress was as seriously concerned with the unlisted as with the listed stock (see preamble, Exchange Act of 1934, (p. 32, Appendix B).

The objective to prevent sales or exchanges of stock effected by misleading statements, omission of material facts, or manipulated or deceptive devices or contrivances, is plainly expressed in both the Securities Act of 1933 and the Securities Exchange Act of 1934 (Appendix B, *post*). The term "sale", of course, includes every type of "disposal" (section 77(b) *post*, p. 31, section 78(c) *post*, p. 32) including exchanges:

> *Park & Tilford, Inc. v. Schulte*, (C.A. 2, 1947), 160 F. 2d 984;
> *Blau v. Mission Corporation* (C.A. 2, 1954) 212 F. 2d 77 at p. 81;
> *Blau v. Hodgkinson* (S.D.N.Y., 1961) 100 F.S. 361, 373.

In the area of publicly held corporations, the scattered public stockholders generally have only the information which those in control of the proxy machinery choose to give them. This is as true of unlisted or unregistered stocks as of listed. Nor does either the Securities Act or the Exchange Act countenance or contemplate any dif-

ferent standard of fairness for one than for the other. The same public policy is applicable to both.

The proxy solicitation here in question, made no attempt to supply the kinds of information which, because they must undergo S.E.C. scrutiny, have become routine and standard requirements in the case of listed stocks. It was defendants' theory at trial (213) (which, however, they made no attempt to justify on appeal) that the reclassification herein was exempt under section 3 of the Securities Act of 1933. Such exemption, however, relates to registration, and was specifically declared inapplicable by section 17(c) to the anti-fraud provisions of the Act. In no event would it apply to the Securities Exchange Act of 1934.

That the proxy disclosures were woefully inadequate by the usual standards and requirements for proxy solicitations, see Loss, *Securities Regulation*, Vol. II, pp. 84 and 85, and Vol. III at p. 1450. The lower court failed to apply those standards to the proxy solicitation here in question.

Even a plan which may be intrinsically justifiable upon full disclosure, will not be sustained in the face of non-disclosure, or inadequate disclosure, of the personal interests of the directors or officers.

> *Seagrave v. Mount, supra;*
> *General Investment Co. v. American Hide and Leather Co.*, 97 N.J. Eq. 230, 233, 234; 127 Atl. 659.

Here, the expertly and persuasively phrased proxy solicitation failed to disclose the conflicting interests of the officers and directors promoting the plan as well as other pertinent and important information. Thus, there was disclosure neither of the identities nor the extent of the interests of the personally involved directors, the personal

profits accruing to them thereby, nor the kind of information as to personal and family holdings customarily required by the S.E.C. for proxy solicitations (313).

Moreover, the proffered stock split, conditioned, however, upon acceptance of the Plan in its entirety (314), was a deceptive device calculated to induce approval of the Plan without regard to its intrinsic merit. So, too, was the persuasive use of the Glore Forgan name (the underwriting firm, long on friendly terms with Cosgrove personally, employed at an $85,000 fee to formulate the Plan) as a "nationally known investment banking firm" without disclosure of the fee that it received for evolving the Plan, or the fact that one of its members (defendant Vrtis) was a director of the Cosgrove-dominated Board. Similarly deceptive was the implication that the Plan adopted by the Crosgrove-appointed Board was the recommendation of an impartial Board, along with concealment of the method used in valuing relinquishment of the Crosgrove control as a justification for the 1000-to-1 exchange ratio (216, 228, 312, 313).

Proxy solicitations thus carefully and persuasively phrased by management are generally effective. Rarely is there any counterbalancing presentation, and the typical small, scattered public stockholders are therefore without adequate information upon which to judge the Plan.

We respectfully submit that double standards of fairness in disclosure, based on whether the stock is listed or unlisted, are not applicable in the use of the mails and interstate commerce for proxy solicitations.

V. The issues herein present fundamental and important questions of public interest as to the nature and responsibilities of the fiduciary relationship of controlling management towards stockholders of publicly held corporations.

This case has already attracted considerable public attention. The decision herein may be an important guide post in the many and varied areas of management responsibilities towards public stockholders, including the opportunities for self-enrichment by dominant stockholders, whether in recapitalization plans, reorganizations, or in trafficking in corporate control. It can materally affect the standards for disclosure in proxy solicitations of unlisted companies.

The importance of these issues is emphasized by the vast and ever-present disparity, in publicly held corporations, between the power of management and the rights available to public stockholders. As heretofore noted, the typical stockholder has neither the means, the data, nor sufficient at stake, to justify the long, costly and difficult battle—so painfully apparent in this case—to challenge unfair, self-aggrandizing raids by controlling management. Without stringent requirements for full disclosure, the full facts will rarely be forthcoming. Without constant and vigorous judicial reaffirmation of their fiduciary reponsibilities and limitations, dominant stockholders and management are emboldened to exploit their trust.

The decision below is patently inconsistent with the rulings in other Circuits, and of this Court, concerning the responsibilities of corporate management and dominant stockholders to the corporations and public stockholders whose interests they are duty-bound to protect. The lower

court's decision obscures and confuses the responsibilities of management in proxy solicitations of unlisted companies. It represents a major set-back in the slow and painful battle to achieve greater, not lesser, protection for public stockholders.

As stated in *40 Virginia Law Review* at p. 207:

> "Increasingly, as shares of corporations have tended to become more widely held, ownership has become divorced from control. *Consequently, there is an increased necessity for imposing strict rules of conduct on directors and officers and inside groups of stockholders who are handling what is in essence 'other people's money'.*" (Emphasis supplied.)

For the reasons herein noted, a writ of certiorari should issue as prayed.

Respectfully submitted,

JOHN SKLAR,
Attorney for Petitioner.

HONIGMAN, MILLER, SCHWARTZ & COHN,
(MAURICE S. BINKOW, *of Counsel*),
2290 First National Building,
Detroit 26, Michigan.

APPENDIX A

OPINION OF THE COURT OF APPEALS

United States Court of Appeals for the Eighth Circuit

No. 16,939.

Edith Honigman, Individually and on behalf of all Class B Stockholders of the Green Giant Company, Appellant, v. Green Giant Company, a Minnesota Corporation, et al., Appellees.	Appeal from the United States District Court for the District of Minnesota.

[November 7, 1962.]

Before VOGEL and VAN OOSTERHOUT, Circuit Judges, and VAN PELT, District Judge.

VAN OOSTERHOUT, Circuit Judge.

This is a class action brought by Edith Honigman, owner of 1,570 shares of Class B non-voting common stock in

Green Giant Company, a Minnesota corporation, against said company, its controlling shareholders, officers, directors and others, to upset a recapitalization plan conceived and proposed by some of the defendants and approved by the vote of all Class A stockholders and by the affirmative vote of 92.3% of the outstanding Class B stock[1] at a legally called stockholders meeting pursuant to notice, at which meeting appropriate amendments to the articles of incorporation were adopted to carry the plan into effect.

Jurisdiction, based upon diversity of citizenship and the requisite amount, is established. The case was tried to Judge Nordbye. In his opinion, reported at * * * F. Supp. * * *,[2] Judge Nordbye sets out the pertinent evidence and the issues, and sound reasoning is set out in support of his conclusion that plaintiff is entitled to no relief. This is a timely appeal from the final judgment dismissing the complaint.

We will briefly summarize some of the relevant corporate history. Green Giant was incorporated in 1903 by 12 persons, including the father and uncle of defendant E. B. Cosgrove. Sixty-seven shares of voting stock were issued. Later 23 shares were retired, leaving a capital structure of 44 shares of voting stock, 26 shares of which were owned during all times here material by E. B. Cosgrove. Mr. Cosgrove became secretary of the company in 1914, general manager in 1918, president in 1929, and chairman of the board in 1954.

In 1923 the corporate articles were amended to leave voting rights exclusively in the 44 shares of Class A com-

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[1] 4,799 shares of Class B stock, consisting of 1.2% of such stock, voted against the proposed plan and amendments. All certificates of Class B shares voted against the plan and amendments except plaintiff's have been exchanged for the new voting stock.

[2] Apparently unpublished, however.

mon stock and to create a preferred stock not here involved, and a Class B common stock which had the same equity and dividend rights as Class A Common stock but no voting rights. Originally Class B stock was issued only to Class A stockholders. Up to 1929, both classes of stock were held by the same people in the same proportions. Soon thereafter Class B stock was sold to the public. At the time of the recapitalization here in dispute, in 1960, there were outstanding the 44 shares of Class A voting stock and 428,998 shares of Class B non-voting stock. The Class B stock was held by some 1250 investors. Mr. Cosgrove still owned his 26 shares of Class A stock and he and members of his family owned about 20% of the Class B stock.

Green Giant is a grower and canner of vegetables and food products. In 1914 the company's annual sales amounted to $7,000. The company prospered through the years under Cosgrove's management. In 1960 its sales amounted to $64,000,000 and its net worth exceeded $23,000,000.

Mr. Cosgrove was 72 years of age in 1960. He died after the trial. While there is no substantial evidence of any dissatisfaction with his management, some concern existed about the existing voting rights. In 1959 the board of directors employed Glore, Forgan & Co., Chicago investment bankers, to make a study of the corporation's capital structure and to prepare a report and make recommendations. Pursuant thereto, a plan was in due course presented and recommended. The plan was approved by the directors and was thereafter approved by separate votes of the Class A and Class B stockholders. The plan is summarized by the court as follows:

> "Under this plan, Class A and Class B shares were to be exchanged for a new class of voting com-

mon stock. Each Class B shareholder was to receive one share of the new common stock for each share of the Class B stock. Each Class A shareholder was to receive ten shares of what is termed convertible common stock, each of which would be converted annually into one hundred new voting shares, and in this manner, after the confirmation of the plan and at the end of a ten-year period, the holders of 44 shares of Class A stock would receive 44,000 shares of the new common stock. Under the plan, the present Class B stockholders would have 49.37 per cent of the voting power upon its adoption, and over the ten-year period, the percentage in voting power yearly would increase until by the tenth year it would be 90.70 per cent. The participation of the Class A shareholders in the assets of the company under the plan would be increased from about .01 per cent to 9.3 per cent."

Plaintiff bases her attack upon the adverse judgment upon the following main headings:

"I. The recapitalizing plan is illegal, unfair and inequitable in exacting without adequate consideration a huge premium for the granting of voting rights to the public Class B stockholders."

"J. The issuance of the bonus stock to the Class A shareholders was a violation of applicable Minnesota laws and statutes requiring adequate consideration, monetary valuation, and protection of preemptive rights."

"III. The disclosure to stockholders accompanying the proxy request was inadequate, misleading and unfair, and in violation of federal and state antifraud laws."

"IV. The majority vote elicited by defendants was binding neither upon the corporation, plaintiff, nor other B shareholders in view of the illegality of the plan as well as the inadequate disclosures incident to the proxy solicitation."

The plaintiff relies heavily on the much discussed view of Professor A. A. Berle that control is a corporate asset. It is claimed therefore that the dilution of the B shareholders' equity cannot be justified by the A shareholders' surrender of their exclusive control. The view was originally stated in Berle & Means, The Modern Corporation and Private Property, 244 (1932):

> "[The power of control] is an asset which belongs only to the corporation; and * * * payment for that power, if it goes anywhere, must go into the corporate treasury."

This view is discussed in Berle, "Control" in Corporate Law, 58 Colum. L. Rev. 1212 (1958). At page 1220 he states:

> "A third group of decisions dealing with the control function relate to benefits derived from its sale. These decisions point to a slowly emerging rule (by no means universally acknowledged) that, where stockholdings carrying control are sold, any identifiable portion of the consideration paid for the power-position over and above the value of the stock ex the control-power element belongs not to the control-seller but to the corporation or (perhaps) to all the shareholders ratably."

No authorities are cited by Professor Berle squarely supporting this broad contention. He urges that *Perlman v. Feldmann*, 2 Cir., 219 F.2d 173, goes far in his direction. When fairly read, *Perlman* does not go to the extent of supporting the rule urged. Other legal writers dispute the validity of a rule that control should be considered a corporate asset. Hill, The Sale of Controlling Shares, 70 Harv. L. Rev., 986, 1006-10, 1018; Note, Fiduciary Duties of Mapority or Controlling Stockholders, 44 Iowa L. Rev. 734, 744-45.

Minnesota law here controls. Plaintiff has wholly failed to demonstrate that the trial court committed any error in failing to follow Professor Berle's proposed rule. No Minnesota cases have been cited or found which indicate that the Minnesota court would follow such view. We have frequently held that we will accept the views of an able and experienced trial judge on doubtful questions relating to the law of his state unless we are convinced that they are erroneous. *Transport Mfg. & Equip. Co. v. Fruehauf Trailer Co.*, 8 Cir., 295 F.2d 22, 227; *Homolla v. Gluck*, 8 Cir., 248 F.2d 731, 734.

We are satisfied that plaintiff has wholly failed to demonstrate that the court's failure to apply the Berle rule, that corporate control is a corporate asset, misapplied or misinterpreted the applicable Minnesota law.

We have given full consideration to all contentions made by the plaintiff and have carefully considered the briefs and record. We believe that all of plaintiff's remaining contentions are completely answered by Judge Nordbye's well-reasoned opinion.

The trial court found it unnecessary to determine whether corporate directors are fiduciaries in the strict sense in the promotion of the recapitalization plan, but found it to be fair and reasonable to place the burden upon the defendants to show the fairness and validity of the plan, "not only to the class of stockholders who hold no voting rights, but to the corporation as well."

The court, after analyzing and detailing the substantial supporting evidence, states:

> "After due consideration, the Court is satisfied that a fair analysis of all the circumstances justifies a finding that defendants have sustained the burden

> of proof in establishing that the premius shares issued to the Class A stockholders is commensurate with the benefit received by the corporation and that the plan is fair and reasonable to the Class B stockholders. The Court concludes that the consideration flowing to the corporation fairly satisfies any demands of the Minnesota statutes relied upon, as well as the basic principles of fair dealing required by equity."

The court likewise found upon the basis of substantial evidence that there had been a full compliance with the Minnesota corporate statutes, that the notice given of the stockholders meeting was not fraudulent, incomplete or misleading, and that there had been no violation of the Federal Securities Act or the Minnesota Blue Sky Laws. There is nothing in the record which challenges the validity of the ownership of the Class A stock carrying the exclusive voting rights. Class B stockholders at the time they acquired their stock knew or were charged with knowledge that exclusive voting rights rested in the Class A stock.

This case does not fall within the usual pattern of cases involving the transfer of corporate control by means of the sale of the majority stock. Here the voting rights were not transfered to outsiders but were given to all existing stockholders.

Minnesota law authorizes recapitalization by amendment of articles of incorporation. M.S.A. §301.37. See *Sherman v. Pepin Pickling Co.*, 230 Minn. 97, 41 N.W.2d 571; 35 Minn. L. Rev. 90.

M.S.A. §301.37-3(3) requires as a minimum the affirmative vote of at least a majority of any class of stockholders that might be adversely affected by recapitalization amendment. It is undisputed that Mr. Cosgrove neither indi-

vidually nor in conjunction with the other Class A stockholders had control of anything approaching a majority of the Class B stock.

It is defendants' position that the court would have been justified in approving the recapitalization plan solely upon the basis of the approval thereof by all classes of stockholders as provided by statute. The trial court properly attaches significance to the vote of the Class B stockholders. It states:

> "[T]he Court cannot ignore the persuasive fact that the holders of 92.3 per cent of all outstanding Class B stock concluded that the plan was fair to them and likewise to the corporation. That fact speaks more persuasively than the arguments of those who attempt to theorize on unrealistic principles of so-called corporate democracy. No one contends that the Class B stockholders were not fully informed of the Class A stock control when they invested in the company stock, and so far as the charge of immoral and reprehensible conduct directed at the Class A stockholders is concerned, suffice it to say that their position in this proceeding must be judged by that which businessmen of ordinary prudence would have done under similar circumstances. The integrity of the Class A stock is not challenged here."

While there appears to be considerable merit to defendants' contention that the enactment of the recapitalization amendment strictly in accordance with the statute alone constitutes a sufficient basis for the dismissal of plaintiff's complaint, we prefer to base our affirmance upon the broader basis rebected by the trial court's opinion that no fraud or inequitable conduct was resorted to in consummating the amendment, and the proposed plan was fair, equitable and beneficial both to the non-voting Class B stockholders and to the corporation.

Plaintiff has completely failed to demonstrate that the judgment appealed from was based upon any erroneous view of Minnesota law or that the court's findings upon which the judgment is based lack substantial evidentiary support. We affirm the case on the basis of the trial court's reported opinion.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

United States Court of Appeals for the Eighth Circuit

No. 16,939.

September Term, 1962.

Edith Honigman, Individually and on behalf of all Class B Stockholders of the Green Giant Company, Appellant, v. Green Giant Company, a Minnesota Corporation, et al., Appellees.	Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now Here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 7, 1962.

APPENDIX B

STATUTES AND S. E. C. RULES INVOLVED

The statutes herein involved are:

1. The Securities Act of 1933, 15 U.S.C. section 77, *et seq.*

Section 77b (3):

> "The term 'sale', 'sell', 'offer to sell', or 'offer for sale' shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; * * *"

Section 77q "'Fraudulent interstate transactions

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser * * *."

* * * * *

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

2. The Exchange Act of 1934:

"For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions."

Section 3a (15 U.S.C. §78c):

"(4) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

"(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit."

Section 78j:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • • • •

"(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, Sec. 10, 48 Stat. 891."

3. Securities and Exchange Commission, Rule 10b-5, 17 CFR 240.10b-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make *any untrue statement* of a material fact *or to omit to state a material fact* necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate, as a fraud or deceit upon any person, in connection with the purchase or sale of any security." (Emphasis supplied.)

4. Minnesota Statutes Annotated, sections 301.15 and 301.16:

"301.15. *Shares; Allotment and Consideration; Liability for Improper Valuation.*

Subdivision I. Consideration.

No shares shall be allotted except in consideration of cash, or other property, tangible or intangible, received or to be received by the corporation, or services rendered or to be rendered to the corporation, or of an amount transferred from surplus to stated capital upon a share dividend.

Subdivision II. Resolution Stating Value.

At the time of each allotment of shares the shareholders or directors making such allotment shall state by *resolution their determination of the fair value* to the corporation *in monetary terms* of any consideration other than cash for which shares with *or without par value* are allotted. (Emphasis supplied.)

Subdivision III. Limitation of Consideration.

The amount of consideration to be received, in cash or otherwise, shall not be less than the par value of shares so allotted, *nor less than the stated capital to be represented by shares without par value so allotted.* • • • (Emphasis supplied.)

301.16. *Shares; Allotment. Consideration. Subdivision I. Allotment, when permitted.*

Shares with or without par value shall not be allotted for a cash consideration which is unfair to the then shareholders nor for a consideration other than cash upon a valuation thereof which is unfair to such shareholders; • • •"